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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11
12 UNITED STATES OF AMERICA,

13 Plaintiff,

No. CR05-424Z

14 v.

ORDER

15 WADE B. COOK, and LAURA M. COOK,

16 Defendants.

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18 This matter comes before the Court pursuant to a Joint Motion in Limine to Exclude
19 Attorney-Client Privileged Communications by Defendants Wade and Laura Cook, docket
20 no. 131. The Cooks' motion seeks to bar the testimony of Tim Berry as a witness and to
21 exclude all fruits of what the Government learned from Mr. Berry's disclosures to the
22 Government.

23 Tim Berry graduated from Seattle University Law School and became a lawyer on
24 November 14, 1997. The Court held an evidentiary hearing on January 16, 2007 to
25 determine the application of the attorney-client privilege to communications between Tim
26 Berry and the Cooks.

1 On or about April 1996, while a law student, Tim Berry saw an advertisement about a
2 job with the Cooks' organization. He responded to the advertisement and was hired by a
3 company then known as United Support Associates. He started work as a paralegal in April
4 1996 and continued in that role through February 1997. In 1997, Mr. Berry became a
5 speaker at Wade Cook Seminars on asset protection and tax savings. In June 1997, Mr.
6 Berry formed Ocean Side Management and continued to provide help to the Cooks.

7 Beginning by at least mid-1997, Mr. Berry started talking to the Cooks about
8 charitable remainder trusts and estate planning. During 1997, Mr. Berry helped the Cooks
9 form a charitable remainder trust and discussed with the Cooks how to protect their assets.
10 The Court has already ruled that nothing Mr. Berry said to the Cooks, or any of their
11 discussions prior to the date he became a lawyer, November 14, 1997, was subject to the
12 attorney-client privilege.

13 Prior to becoming a lawyer, Mr. Berry sent the Cooks Exhibit 227. Exhibit 227 was a
14 fax and various attachments including schematics on how a charitable remainder trust could
15 be used to protect the Cooks assets. Mr. Berry also testified, and I find, that he prepared and
16 sent an "Owner's Manual" explaining how the charitable remainder trust would work, Trial
17 Exhibit 229, to the Cooks before November 14, 1997. The Owner's Manual alerted the
18 Cooks to numerous restrictions placed upon the charitable remainder trusts including
19 prohibitions on self-dealing and the need to pay taxes on any disbursements. A version of
20 the charitable remainder trust was also prepared by Mr. Berry and provided by him to the
21 Cooks prior to November 14, 1997.

22 A version of the charitable remainder trust, Exhibit 426, was mailed by the Cooks'
23 attorney to the Federal Trade Commission in 2002. This document was dated October 14,
24 1997. Mr. Berry testified that the October 14, 1997 date was consistent with his recollection
25 of the time frame when the document was prepared. See Trial Exhibit 426. Mr. Berry also
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1 provided a letter to Eric Marler, Exhibit 228, around the time the charitable remainder trust
2 was prepared. The letter was sent to Eric Marler, a consultant, friend, and Cook adviser.

3 Mr. Berry began providing legal advice to the Cooks after he became a lawyer in
4 November 1997. His advice continued through March 1999, when Mr. Berry and the Cooks
5 had a falling out.

6 Prior to July 2003, Mr. Berry sought out Agent Shipley for the purpose of telling the
7 Government about the Cooks' activities. Mr. Berry met with Government lawyers in July
8 2003. The notes of the Government representatives reflect that Mr. Berry was told not to
9 reveal attorney-client privileged communications. Mr. Berry discussed with the Government
10 the creation of the charitable remainder trust, the owner's manual, the letters to Wade Cook
11 and Eric Marler, and the work he performed for the Cooks.

12 Mr. Berry testified at the evidentiary hearing that at no time has the Government
13 asked him to disclose any confidential information with respect to his involvement with the
14 Cooks. Mr. Berry also testified that, to the best of his ability, he has avoided providing
15 privileged information to the Government. Statements by Mr. Westinghouse to the Cooks'
16 attorney, Robert Chicoine, indicate that the Government also believed that the attorney-client
17 privilege did not apply, and that the Cooks were not entitled to rely on legal advice from Mr.
18 Berry before he was admitted to practice law. See Chicoine Decl., docket no. 228, at ¶ 5. I
19 find that the Government attempted to limit Mr. Berry's disclosures to matters occurring
20 before Mr. Berry became a lawyer, or to conversations with third parties, including Eric
21 Marler, which the Government reasonably believed would not be privileged. I also find that
22 certain disclosures were made that involved confidential attorney-client discussions, and
23 documents were provided by Mr. Berry that were prepared after he became a lawyer and
24 would have been subject to the attorney-client privilege.

25 Mr. Berry met with Zaman Farukhi in early 1999 and discussed the charitable
26 remainder trust he had created for the Cooks. Mr. Farukhi was the Cooks' tax advisor and

1 consultant but had no involvement with the charitable remainder trusts or the tax
2 consequences of creating the documents known as the charitable remainder trusts.

3 Accordingly, any communications between Mr. Berry and Mr. Farukhi were not privileged.

4 See, e.g., United States v. Judson, 322 F.2d 460, 462-63 (9th Cir. 1963); see also United
5 States v. Brown, 349 F. Supp. 420, 425-26 (N.D. Ill. 1972) (“[P]rivilege does not extend to
6 protect an accountant’s papers prepared while employed by a taxpayer.”).

7 I find that the Government did not take any action to intentionally interfere with the
8 attorney-client relationship between the Cooks and Tim Berry. The Government did not ask
9 for and did not understand it was obtaining information from Mr. Berry that would invade
10 the privilege. To the extent Mr. Berry told the Government more than he should – to the
11 extent he revealed confidential communications after he became a lawyer – it was done by
12 Mr. Berry. The Government did not improperly induce Mr. Berry to breach his ethical duty
13 of confidentiality to his client.

14 In this case we have a situation, at most, where Mr. Berry as a lawyer may have
15 breached his attorney’s obligation of confidentiality to the Cooks. Any remedy should be
16 tailored to the injury suffered. This case is very close to United States v. Rogers, 751 F.2d
17 1074 (9th Cir. 1985). In Rogers, the defendant’s former attorney, Ira Miller, revealed
18 confidential communications to an IRS agent, in violation of his ethical obligations. Miller
19 was not the attorney representing the taxpayer (Rogers) in the IRS investigation, just as Mr.
20 Berry did not represent the Cooks during the IRS investigation. The fact that Mr. Berry
21 failed to assert the ethical obligation does not transform the investigation into Government
22 misconduct. See id. at 1080 (“Normally, an attorney is in a better position to protect the
23 confidences of his client and to know the scope of his ethical duty to his client than is an IRS
24 agent.”). As noted in Rogers, where an attorney breaches his obligation suppression of that
25 evidence at trial is appropriate. Rogers also noted, however, the fundamental distinction
26 between the use of privileged information at trial and its use during the investigation.

1 The Cooks made no secret about their charitable remainder trust. Mr. Cook on
2 numerous occasions during 1998 and 1999 talked about his charitable remainder trust and
3 described the whole process of putting royalties inside a limited partnership and putting the
4 limited partnership inside the charitable remainder trust.

5 If the inquiry ended with the disclosures by Mr. Berry after he became a lawyer, I
6 would order that he not be able to testify about events after he became a lawyer. Even here,
7 the Court notes that substantially all of the Berry-Cook communications about the charitable
8 remainder trust occurred before any privilege came into being. However, there is more to the
9 story. In the Spring of 2005 the Cooks, who were represented by new counsel, agreed to
10 meet with the Government and tell their story under oath. Both Cooks, with this new
11 counsel present, met with the Government and testified freely and voluntarily, under oath.

12 During the Cooks' meetings with the Government, the Cooks testified at length about
13 their communications with Mr. Berry. The Cooks testified regarding their communications
14 with Mr. Berry regarding the formation of the charitable remainder trust, as well as other
15 related communications including tax consequences and the withdrawal of funds. The
16 Cooks' sworn testimony frequently refers to Mr. Berry, with substantial testimony regarding
17 specific communications between Mr. and Mrs. Cook and Mr. Berry. The following are
18 some excerpts from that testimony.

19 Mr. Cook testified about how Mr. Berry, as an attorney, proposed the structure for the
20 limited partnership and charitable remainder trust.

21 A. * * * Well, Tim Berry had an idea – again, he's an attorney – he had an
22 idea that we could set up a limited partnership, put all the royalties into
23 a limited partnership, and then assign all the units in the partnership to
24 the LDS Church. And we talked about it for a couple of weeks. I had
25 never thought of this, but he came into my office. He made this
26 presentation. I said, "Do you know – how would this work?" He drew
out – went on his computer, I guess, and drew out diagrams. "You
place the royalties and the copyrights here, and then you donate the
units over here to a CRT," and then Laura didn't really understand it. I
thought I understood it.

1 Defs.' Resp., docket no. 209, ex. 1 (Wade Cook Tr. April 8, 2005) at 100-101. Mr.
2 Cooks' testimony further acknowledged Mr. Berry's role as an attorney.

3 Q. Was Mr. Berry an employee of Wade Cook Financial Corporation or
4 was Mr. Berry your personal attorney?

5 A. I don't even know if he was – I think he might have been one of our
6 employees at one time, but through all of these things here, he was an
7 employee of his own law firm, so –

8 Q. What was the name of the law firm?

9 A. It was Anderson Law Group, and it was formed by Bob Anderson to do
10 our seminars, and then he, Berry, and Childers – it was called the Berry
11 Childers law firm – bought out the Anderson Law Group.

12 Q. What was the experience of Mr. Berry at the time that he proposed this
13 charitable remainder trust to you; that is, what was the nature of his
14 legal practice? How much experience had he had in trusts, for
15 example?

16 A. Well, he – for several years, you know, they did all of the trust work,
17 the living trusts and all that, I know for sure. Now I realize he probably
18 didn't have that much experience with charitable remainder trusts, but
19 he sure acted like he did when he came into my office. He was all
20 knowledgeable and we could do this and this and this and assign the
21 royalties, and basically, again, our wealth was tied up in our stock. It
22 wasn't in our entity.

23 Id., ex. 1 (Wade Cook Tr. April 8, 2005) at 117-18. Mr. Cook later attributed various other
24 actions and tax consequences to advice given by Mr. Berry.

25 A. . . . And there were quite a few works, you know, after that time, that went into
26 the trust – into the limited partnership.

Q. You never saw an appraisal; isn't that correct?

A. I said I didn't.

Q. You never talked with anyone other than Mr. Berry about the valuation of the
partnership units that you were contributing to the trust?

A. As I said, Tim and I discussed it and it was not going to be worth it to do that,
and to take a deduction for those units, so we decided not to pay the extra
expense, so we decided not to take a deduction.

1 Id., ex. 1 (Wade Cook Tr. April 8, 2005) at 165-66. Mr. Cook attributed his treatment of
2 funds in the charitable remainder trust and partnership structure to advice given by Mr.
3 Berry.

4 A. Again at Tim Berry's direction, he told us that the way to – if we needed
5 money out of the company, because we had obligations, that we can create
6 from Never Ending Wealth to ourselves a line of credit, and that when the
7 royalties were received, we could borrow out the money, and we could create it
8 up to \$3 million, which is what he suggested, so from time to time we would
9 do that. We would document it in a ledger. When we repaid the loan, we
10 would figure out the interest to that point, and pay back some of the loan, and
11 then we would borrow money and then pay some back.

12 Id., ex. 1 (Wade Cook Tr. April 8, 2005) at 214-15.

13 The Defendants rely heavily on the prosecutor's knowledge, having talked to Mr.
14 Berry, that Mr. Berry had told the Cooks specifically that borrowing from the charitable
15 remainder trust was a potential problem. Id., ex. 1 (Wade Cook Tr. April 8, 2005) at 215:11-
16 13. The Defendants claim this is the fruit of the Government's misconduct. However, this
17 question, put in context, only occurs after Mr. Cook stated under oath that Tim Berry advised
18 the Cooks they could establish a line of credit up to \$3.0 million and borrow the royalties
19 after they had been put in the trust.

20 Laura Cook offered similar testimony which put the Cooks' communications with Mr.
21 Berry at issue and disclosed the substance of Mr. Berry's advice.

22 Q. You said that Mr. Berry told you something about withdrawing money in the
23 form of loans or that if you did withdraw money, it should be in the form of
24 loans. Do I have that correct?

25 A. Yes.

26 * * *

Q. Did Mr. Berry tell you about the concern of self-dealing that might come into
play if there were loans from the limited partnership or the trust to you and Mr.
Cook?

A. No.

Q. Was there any discussion by Mr. Berry of self-dealing?

1 A. I don't remember those terms at all. In fact, the first time I saw it was when
2 you showed me that letter that he supposedly sent to Wade.

3 Id., ex. 2 (Laura Cook Tr. April 13, 2005) at 130-32.

4 The Cooks' disclosure of communications with Mr. Berry was substantial, and
5 included communications covered by the attorney-client privilege. The Cooks acknowledged
6 Mr. Berry's role as attorney and advisor. During their interviews, the Cooks apparently did
7 not claim the attorney-client privilege was applicable, although they were represented and
8 counsel was present during their testimony. These undisputed facts alone are sufficient to
9 effect an express waiver of the attorney-client privilege to the extent it is applicable to the
10 Cooks' communications with Mr. Berry regarding the charitable remainder trust, the limited
11 partnership, and Mr. Berry's advice in that regard. See United States v. Plache, 913 F.2d
12 1375, 1380 (9th Cir. 1990). The Cooks effected a complete disclosure of their
13 communications with Mr. Berry in an attempt to avoid indictment. Under Plache, the Court
14 finds the attorney-client privilege was expressly waived by Mr. and Mrs. Cook.

15 The Cooks argument that a finding of waiver is inappropriate because of Government
16 misconduct is unavailing. This is not a case in which a defendant's sixth amendment right to
17 counsel is involved. As the Ninth Circuit observed in United States v. Rogers, 751 F.2d
18 1074, 1077 (9th Cir. 1985), Mr. Berry was not an attorney representing the Cooks in
19 defending against a criminal charge. Instead, he was a potential witness because of the past
20 representation. Id. Here, as in Rogers, the Court is faced with "only a situation in which a
21 potential witness, who was an attorney, talked to federal agents about past representation of a
22 client; this, at most, involved a breach of the attorney's ethical obligation of confidentiality."
23 Id. The attorney-client privilege is violated only if the attorney is required to testify to the
24 contents of confidential communications between him and his client. Mr. Berry was not
25 required to testify regarding his confidential communications with the Cooks.

26 The Cooks' decision to meet with the Government to provide sworn statements must
 also be considered in light of their knowledge that the Government was meeting with Mr.

1 Berry. See Chicoine Decl., docket no. 228, ¶¶ 2-3. The Cooks were faced with a possible
2 invasion of the attorney-client privilege as a result of Mr. Berry's discussions with the
3 Government. I find that the Cooks' choice to give sworn testimony, including substantial
4 testimony about communications arguably covered by the attorney-client privilege, was a
5 waiver. The Cooks may not disclose the substance of an attorney-client communication for
6 purposes of obtaining a benefit (i.e., the dismissal of the indictment) and later retract the
7 waiver to obtain a different benefit at trial. The Cooks cannot use their communications with
8 Mr. Berry as an excuse for their conduct and then hide behind the privilege at trial. Wade
9 and Laura Cook expressly waived the attorney-client privilege as it applied to Mr. Tim Berry
10 through their sworn statements to the Government. There was no "trickery involved to
11 invoke this testimony." Plache, 913 F.2d at 1380. While represented by counsel the Cooks
12 chose to disclose the contents of their communications with their attorney.

13 When the Cooks learned of Mr. Berry's meeting with the Government, they had a few
14 options:

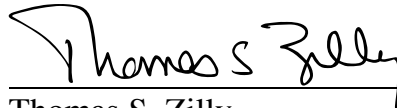
- 15 **Option 1:** Refuse to meet with the Government and approach the Court for
16 suppression of any improperly obtained attorney-client information.
See Rogers, 751 F.2d 1074.
- 17 **Option 2:** Meet with the Government and provide sworn statements. The Cooks
18 could have refused to disclose attorney-client communications related to
19 Mr. Berry, reserving their right to move to suppress improperly
disclosed attorney-client communications.
- 20 **Option 3:** Meet with the Government and provide all information, including
21 testimony regarding Mr. Berry, expressly waiving the attorney-client
privilege regarding Mr. Berry by providing sworn testimony about their
communications with Mr. Berry.

22 The Cooks chose the third option. They waived the attorney-client privilege as to Mr.
23 Berry by testifying in great detail about their communications with him. They did so after
24 they learned Mr. Berry had been meeting with the Government, they did so with the advice
25 of counsel who was advising them with regard to the criminal tax investigation, and they did
26 so in a manner that left nothing of the privileged communications confidential.

1 By choosing to meet with the Government and discuss the substance of their
2 communications with Mr. Berry, the Cooks expressly waived the attorney-client privilege to
3 the extent it applies to Mr. Berry. Accordingly, the Court DENIES Defendants' Joint
4 Motion in Limine to Exclude Attorney-Client Privileged Communications, docket no. 131.

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6 IT IS SO ORDERED.

7 DATED this 23rd day of January, 2007.

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10 Thomas S. Zilly
11 United States District Judge
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